

Message Text

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ACTION EUR-12

INFO OCT-01 ISO-00 SSO-00 NSCE-00 USIE-00 INRE-00
CIAE-00 DODE-00 PM-05 H-01 INR-07 L-03 NSAE-00
PA-01 PRS-01 SP-02 SS-15 IO-13 ACDA-12 HA-05
SCS-06 CA-01 /085 W
-----057150 051613Z /53

O R 051452Z DEC 77
FM AMEMBASSY BONN
TO SECSTATE WASHDC 3696
INFO USMISSION USBERLIN IMMEDIATE
AMEMBASSY BERLIN
AMEMBASSY LONDON
AMEMBASSY MOSCOW
AMEMBASSY PARIS
USMISSION USNATO

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E.O. 11652: GDS
TAGS: PGOV AKB BQG
SUBJECT: REFERRAL OF CASE FROM BERLIN COURT TO FRG
FEDERAL CONSTITUTIONAL COURT

REFS: (A) STATE 280194; (B) USBER 2945; (C) BONN 18965

SUMMARY. GIVEN PAST INSENSITIVITY OF FRG
FEDERAL CONSTITUTIONAL COURT (FCC) TO ALLIED LEGAL VIEWS
ON BERLIN AND LONG TIME SINCE CASE REFERRED TO FCC,
THERE CAN BE NO ASSURANCE THAT FCC WILL RELINQUISH CASE
EVEN IF BERLIN LANDESSOZIALGERICHT (LSG) WITHDRAWS CASE
EITHER VOLUNTARILY OR ON ALLIED ORDERS. WHILE NEITHER
ALLIED NOR GERMAN FEDERAL GOVERNMENT COULD FORCE FCC
TO DROP CASE, ALLIES COULD MAKE CERTAIN THAT BERLIN
COURTS AND AUTHORITIES UNDERSTAND THAT THEY ARE NOT
LEGALLY BOUND BY ANY FCC DECISION CONCERNING MERITS OF
PENDING CASE. END SUMMARY.

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1. DURING DISCUSSION WITH A SOURCE REFERRED TO IN PARA
TWO OF REFTEL (C), IT BECAME CLEAR THAT IF THE AK WERE
TO ORDER THE BERLIN LANDESSOZIALGERICHT (LSG) TO WITH-
DRAW ITS APPLICATION TO THE FEDERAL CONSTITUTIONAL
COURT (FCC), OR WERE THE LSG TO DO SO VOLUNTARILY, THERE
WOULD BE NO CERTAINTY THAT THE FCC WOULD CONSEQUENTLY

SUSPEND OR TERMINATE ITS CONSIDERATION OF THE MERITS OF THE CONSTITUTIONAL QUESTION INVOLVED. IT IS ENTIRELY POSSIBLE THAT THE FCC, OVER WHICH THE AK HAS NO JURISDICTION, WOULD REACH A DECISION ON THE MERITS OF THE CASE OF WHICH IT COULD CHOOSE TO CONTINUE TO CONSIDER ITSELF LEGITIMATELY SEIZED.

2. GIVEN PAST INSENSITIVITY OF THE FCC TO THE LEGAL VIEWS OF THE ALLIES RE BERLIN, THERE IS NOTHING THE ALLIES COULD DO EFFECTIVELY TO TAKE THE CASE AWAY FROM THE FCC IF THE FCC DOES NOT CHOOSE TO RELINQUISH IT. WE ARE ALSO CONVINCED THAT THERE IS NOTHING THE FRG FEDERAL GOVERNMENT CAN DO TO REMOVE THE CASE FROM THE FCC. THUS, UNLESS IN CONNECTION WITH THE MEETING OF BERLIN MINISTERS WITH GOVERNING MAYOR STOBBE AN ACCEPTABLE NEW PRACTICAL COURSE OF ACTION IS DEVELOPED, WE DO NOT BELIEVE THERE IS ANY OTHER ALTERNATIVE TO ORDERING THE LSG TO WITHDRAW ITS REFERENCE OF THE CASE TO THE FCC, THE CLEAR IMPLICATION OF THAT ORDER BEING THAT IN THE ALLIED VIEW THE CASE WAS NOT PROPERLY REFERRED TO THE COURT IN THE FIRST PLACE AND IS THUS IMPROPERLY BEFORE THE FCC SO FAR AS BERLIN IS CONCERNED. THE FCC KNOWS ENOUGH ABOUT THE ALLIED VIEWS ON THE LEGAL EFFECT OF THE FCC'S OPINIONS IN BERLIN TO REALIZE THAT BY GOING TO A DECISION THEY WOULD BE HEADING FOR ANOTHER CONFRONTATION WITH THE ALLIES CONCERNING THE CONFIDENTIAL

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EFFECT OF AN FCC DECISION IN BERLIN. IF THE FCC NONET NONETHELESS CHOOSES TO PROCEED, THERE ARE SUFFICIENT MEANS FOR THE ALLIES TO MAKE ABSOLUTELY CLEAR THEIR LEGAL VIEWS AS TO THE STATUS OF THAT DECISION IN BERLIN IN RELATION TO THE SUBSEQUENT ACTIONS OF THE BERLIN COURTS, THE BUNDESVERSICHERUNGSAINSTALT AND/OR THE BERLIN HOUSE OF REPRESENTATIVES.

3. SO FAR AS THE ALLIES AND BERLIN COURTS AND AUTHORITIES ARE CONCERNED, THE FCC DECISION WOULD NOT BE LEGALLY BINDING. THE FCC DECISION WOULD LEAVE THE RENTENREFORM-GESETZ UNCHANGED IN BERLIN AS TO ITS TERMS AND THEIR APPLICATION TO NON-GERMANS RESIDING ABROAD. IN ORDER TO ENSURE THAT THE FCC DECISION IN SUCH AN EVENT IS SEEN AND LEGALLY RECOGNIZED NOT TO BE BINDING IN BERLIN, THE ALLIED KOMMANDATURA MIGHT APPROPRIATELY NEED TO ISSUE A BK/O OR SOME OTHER FORM OF INSTRUCTION OR CLARIFICATION.

4. THE QUESTION WOULD THEN BE, WHAT HAPPENS TO THE CASE IN BERLIN (A) IF THE FCC HAS FOUND THE PARTICULAR PROVISION UNCONSTITUTIONAL OR (B) IF IT HAS FOUND THAT PROVISION CONSTITUTIONAL. IT SEEMS CLEAR THAT IT WOULD

NOT MAKE SENSE IF THE PROVISION WERE ALTERED IN THE FRG
BY AN FCC DECISION BUT NOT IN THE
ONLY JURISDICTION WHERE THE CLAIMS OF NON-

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C O N F I D E N T I A L SECTION 02 OF 02 BONN 20092

GERMANS RESIDING ABROAD ARE NOW PROCESSED. EQUALLY, IF
THE FCC FINDS THE PROVISION CONSTITUTIONAL IT WOULD NOT
BE TENABLE FOR THE CURRENT DOUBTS OF THE LSG AND THE
APPARENT FINDING OF UNCONSTITUTIONALITY OF THE
SOZIALGERICHT IN BERLIN TO REMAIN ON THE RECORD AS IS.
EITHER WAY, THEN, THE SUBSTANTIVE DECISION OF THE FCC
WOULD IN SOME WAY NEED TO BE GIVEN PRACTICAL EFFECT IN
BERLIN WITH RESPECT TO THE PENDING CASE AND ITS OUTCOME
AS WELL AS WITH RESPECT TO FUTURE CASES AND THE
ADMINISTRATION OF THE SOCIAL SECURITY ACCOUNTS OF ALL
NON-GERMANS RESIDING ABROAD.

5. THE EMBASSY BELIEVES THAT THE ALLIED MISSIONS AND
THE AK LEGAL COMMITTEE ARE IN THE BEST POSITION, IN THE
COURSE OF THE APPROACH OF ALLIED MINISTERS TO THE
GOVERNING MAYOR AND ANY FOLLOW-UP DISCUSSIONS OF

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EXPERTS, TO EXPLORE AND SHED LIGHT ON THE ALTERNATIVE WAYS TO ACHIEVE A PRACTICAL SOLUTION FOR BERLIN AND THE PENDING CASE, WHICHEVER WAY THE FCC OPINION GOES.

6. EMBASSY UNDERSTANDS THAT THE FRENCH ARE NOW ALSO ON BOARD FOR THE MINISTERS MEETING WITH STOBBE ON THE BASIS OF THE TALKING PAPER. WE UNDERSTAND, HOWEVER, THAT THE UK EMBASSY EXPECTS INSTRUCTIONS THAT THE TALKING PAPER IS NOT TO BE CONVEYED TO THE BERLIN AUTHORITIES.

MOREOVER, THE UK EMBASSY EXPECTS TO STRESS THAT IN THE EVENT OF AN FCC DECISION ON THE MERITS OF THE CASE, THE ALLIES WOULD HAVE TO ISSUE INSTRUCTIONS THAT THE BERLIN COURTS AND AUTHORITIES (A) ARE NOT LEGALLY BOUND BY THE FCC DECISION, AND (B) MAY NOT TAKE THE FCC DECISION INTO ACCOUNT IN THEIR ACTIONS. WE DO NOT BELIEVE THAT THIS WOULD MEAN THAT THE BERLIN COURTS AND AUTHORITIES, ACTING ON THEIR OWN, COULD NOT, AS IN THE PAST, ESPOUSE THE FCC'S RATIONALE IN THEIR DECISION AND ACTIONS, SO LONG AS THEY MAKE NO REFERENCE TO SUCH AN FCC DECISION.

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